THE CONSEQUENCES OF CONTEMPORARY LEGAL RELATIVISM

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I. INTRODUCTION

THE idea of moral relativism has been much discussed of late. This discussion, however, has not succeeded in distilling the idea of moral relativism down to a single unequivocal set of ideas. As a rough first approximation, moral relativism involves the idea that moral right and wrong do not transcend the beliefs of or standards set by some particular reference group or community. However moral relativism is thought of, it is unquestionably a phenomenon of substantial contemporary influence.

The contemporary prominence of moral relativism has not escaped the notice of either judges[1] or moral and legal theorists.[2]

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1. *See, e.g.*, Sands v. Morongo Unified School Dist., 214 Cal. App. 3d 45, 57, 262 Cal. Rptr. 452, 465 (McDaniel, J., concurring), *review granted*, 782 P.2d 1139, 264 Cal. Rptr. 683 (1989); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 32, 137 Cal. Rptr. 43, 62 (McDaniel, J., dissenting), *cert. denied*, 434 U.S. 877 (1977); Pantely v. Garris, Garris & Garris, P.C., 180 Mich. App. 768, 772, 447 N.W.2d 864, 868 (1989) (referring to "the backdrop of a moral relativism that passes for intellectual sophistication in contemporary America").

2. *See* Brandt, *Relativism Refuted?*, 67 MONIST 297, 301 (1984) (referring to "how widespread relativism is today"); Taylor, *Four Types of Ethical Relativism*, 63 PHIL. REV. 500, 500 (1984) (referring to "widespread acceptance" of moral relativism by educated persons in the twentieth century); Wiles, *Harman and Others on Moral Relativism*, 42 REV. METAPHYSICS 783, 783 (1989) (referring to defenses of moral relativism as "no longer unusual"). *Cf.* Railton, *Moral Realism*, 95 PHIL. REV. 163, 163 (1986) (morality commonly treated as "subjective or conventional" in our secular intellectual culture);

Justice Blackmun, for example, has argued that "[r]elativistic notions of right and wrong . . . have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal."[3]

One might suppose that the influence of moral relativism, however pervasive at lower judicial levels, has not yet significantly influenced the Supreme Court. Legal manifestations of moral relativism, or what we shall for convenience refer to as legal relativism, would at first blush seem out of place in the conservative jurisprudence of the contemporary Supreme Court. The conservative emphasis on constitutional text and on the framers' intent should work against relativism. We do not ordinarily tend to think of the constitutional framers as completely determined in their moral thinking by the developing strands of cultural relativism of the Enlightenment,[4] and the text of the Constitution itself does not ordinarily tend to suggest a relativist interpretation as the preferred reading.[5] Particularly in light of

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Unwin, *Relativism and Moral Complacency*, 60 PHIL. 205, 211 (1985) (referring to "the loose subjectivism that forms such a notable part of our current malaise"); Werner, *Ethical Realism*, 93 ETHICS 653, 677 (1983) ("moral subjectivism" as the currently prevailing intellectual opinion). Alasdair MacIntyre has referred to ours as an "increasingly emotivist culture." A. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 343 (1988). For analogous observations by legal theorists, see J.H. ELY, DEMOCRACY AND DISTRUST 54 (1980) ("[O]ur society . . . rightly does not . . . accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives."); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 n.206 (1975) ("Pluralist political theory may be regarded as a translation into collective terms of the principle of subjectivity of individual values.").

3. Parker v. Levy, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring).

4. A certain sympathy with the moral practices of other cultures is detectable, for example, in MONTESQUIEU, THE PERSIAN LETTERS (G. Healy trans. 1964) and D. DIDEROT, *Supplement to Bougainville's "Voyage,"* in RAMEAU'S NEPHEW AND OTHER WORKS 179-228 (J. Barzun & R. Bowen trans. 1964), but this hardly amounts to moral relativism in any thoroughgoing sense. *See* C. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS 29-31 (1932). *Cf.* E. CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 6 (1951) ("The eighteenth century is imbued with a belief in the unity and immutability of reason. Reason is the same for all thinking subjects, all nations, all epochs, and all cultures.").

5. We will at this point set aside such questions as whether interpreting

Justice Blackmun's admonition quoted above, one would not anticipate that moral relativism would detectably inform contemporary Supreme Court constitutional jurisprudence.

On the other hand, if moral relativism is in fact a deep and pervasive cultural trend, it is difficult to imagine that it never filters into and affects contemporary Supreme Court constitutional jurisprudence.

This essay will argue both that legal relativism has in fact influenced contemporary Supreme Court constitutional jurisprudence, and that such influence will not tend to be beneficial. The emphasis of this essay will be on the argument that even if relativism cannot be technically refuted as a philosophical doctrine, it offers a number of pragmatic disadvantages, with no compensating advantages.

Establishing unequivocally the presence of legal relativism at the Supreme Court will ordinarily be difficult for two reasons. First, the underlying idea of moral relativism itself has been defined in various ways,[6] and there is no guarantee that these

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and applying a relativist constitutional provision necessarily must be done in a relativist way, or whether a judge who does not subscribe to moral relativism could recognize and apply such a relativist constitutional provision in a way that is morally defensible without any reliance on the truth of moral relativism. There is nothing particularly relativist about determining that a relativist interpretation of a particular constitutional provision is jurisprudentially uniquely and objectively correct.

6. For a sense of the diversity of understandings of moral relativism, see, e.g., Carson, *Relativism and Nihilism*, 15 PHILOSOPHIA 1, 1-3 (1984) (referring to "many" versions of moral relativism, but settling on an understanding of "[m]eta-ethical relativism [as] the view that there are moral issues about which there is no moral judgment that is more correct than all other conflicting judgments"); Devine, *Relativism*, 67 MONIST 405, 405 (1984) ("the essence of relativism" taken to be "that reasoning is possible only given shared assumptions, and that there is a plurality of possible sets of assumptions between whose adherents no argument is possible"); Harman, *Is There a Single True Morality?*, in RELATIVISM: INTERPRETATION AND CONFRONTATION 363, 371 (M. Krausz ed. 1989) ("Moral relativism denies that there are universal basic moral demands and says different people are subject to different basic moral demands depending on the social customs, practices, conventions, values, and principles that they accept."); Moser, *A Dilemma for Normative Moral Relativism*, 26 S.J. PHIL. 207, 207 (1988) ("Moral relativism comes in various forms."); Peterson, *Remarks on Three Formulations of Ethical Relativism*, 95 ETHICS 887 (1985) (discussing the varying formulations of Professors R.B. Brandt, Bernard Williams, and Philippa Foot); Rorty, *Solidarity or Objectivity?*, in

definitions are coextensive. Second, and more importantly, even if we arrive at a clear and unequivocal understanding of what we mean by moral relativism, it will often be difficult to determine whether a given judicial judgment, interpretation, or line of reasoning genuinely reflects moral relativism or not. A judicial pronouncement with relativist overtones may not reflect the judge's adoption of relativism, or his or her conclusion that the Constitution in the particular instance requires or permits relativism. For example, holding the single relevant moral truth that pluralism, diversity, and tolerance are objectively called for under the circumstances, quite apart from whether any community or group-based moral norm or belief would so suggest, is not moral relativism in spite of the relativist overtones.

RELATIVISM: INTERPRETATION AND CONFRONTATION 35, 37 (M. Krausz ed. 1989) (presenting three distinct interpretations of relativism); Taylor, *supra* note 2, at 500-05 (discussing four varieties of moral relativism); Unwin, *supra* note 2, at 205 (distinguishing between less and more radical forms of moral relativism).

The ambiguity of the idea of moral relativism is illustrated by the fact that while Professor MacIntyre, for example, has expressly dissociated himself from moral relativism, A. MACINTYRE, *supra* note 2, at 364-69, it would not be misleading to think of MacIntyre as in fact adopting a progressive but tradition-based relativism. While MacIntyre's understanding of moral relativism is therefore underinclusive for certain purposes, other conceptions of moral relativism are misleadingly overinclusive. Robert Bork, for example, has referred to the putative "right not to conform, the right to dignity, and the right to be left alone" as "expressions of rampant individualism and hence of moral relativism." R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 246 (1990). The most that can be said is that an increasing emphasis on individualism and human dignity may, at least in our era, be somehow associated, perhaps psychologically, with the rise of moral relativism. But as a matter of strict logic, one can certainly reject moral relativism and still believe that the dignity of the individual person and the most elemental human rights can somehow be shown to be universally and objectively binding moral requirements.

Given the multiple ambiguity of the notion of moral relativism, this essay will leave aside such philosophically intriguing, but less immediately decisive, questions as the relationship between moral relativism on the one hand and the doctrine of moral realism on the other. *Compare, e.g.*, Sayre-McCord, *The Many Moral Realisms*, 24 S.J. PHIL. 1, 13 (1986) (relativism as a non-objectively based version of moral realism) *with* Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1471 (1986) (student Note of Professor Heidi M. Hurd) ("The most precious tenet of moral relativism, the tenet that marks its fundamental ontological difference from moral realism, is the metaphysical claim that the truth value of moral propositions is relative to the beliefs of a discrete reference group.").

While this essay need not, and will not, adopt any particular definition of moral relativism from among the assortment available, it may be helpful to offer some sort of rough typology of some possible metaethical views, to help locate generally the idea of moral relativism. Certainly this typology does not necessarily correspond to anyone's, let alone everyone's, actual usage of the terms. It may nonetheless be useful first to associate what we might call "moral absolutism" with the idea that in every problem of human choice affecting the interests or wishes of others, there will be a uniquely and objectively morally right or best choice. "Moral objectivism," in contrast, would make the less ambitious claim that for most problems, one or more possible choices will be objectively morally better than others, for reasons independent of the moral norms or beliefs of some particular community or group.[7] "Moral relativism," of course, would emphasize the dependence of moral right and wrong upon the moral norms or beliefs of some particular community or group of persons. What might be called "moral subjectivism" would be simply a limiting case of moral relativism, in which the reference group or community is reduced to one person, the speaker or moral evaluator. This of course does not imply that moral subjectivism would tend to be just as effective as an instrument of social coordination and control as moral relativism.

In this typology, moral absolutism, moral objectivism, moral relativism, and even moral subjectivism would share a belief that some possible courses of conduct are in some sense morally right and others morally wrong. All these approaches would differ from the view holding false all claims that a given course of conduct is morally right on the one hand,[8] and from moral noncognitivism on the other, which would hold that moral claims are not the sort of thing that can be true or false in any

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7. It should be noted that a moral objectivist might believe that some such possible courses of action are objectively morally better than others, without knowing or even considering to be knowable, in a particular case, the moral status or value of any particular choice. Metaphysics is a separate question from epistemology, in the sense that there might be unknown or unknowable objectively morally right answers. For the distinction between metaphysical and epistemological claims in this context, see Note, *supra* note 6, at 1421 n.8.

8. John Mackie is sometimes interpreted as adopting this view. *See* J. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977).

substantive, traditional sense.[9] While these logical distinctions between various sorts of moral cognitivism and noncognitivism can be drawn, there is of course no guarantee that some forms of moral cognitivism, such as moral relativism, will either be logically consistent and coherent or that they will in a given historical context be stable and efficacious over the long term.

Ultimately, then, this essay will call into question not the logical consistency or technical acceptability of legal relativism, but what might be called its distinctive pragmatic attractiveness. The essay aims not at a strict refutation of logical relativism, but at exposing what most ordinary persons would consider the significant practical disadvantages, risks, and uncertainties associated with legal relativism, along with the surprising lack of clear potentially compensating practical advantages.

The essay will briefly document the surprising paucity of philosophical support for a genuinely thoroughgoing relativism. Again, to show that few relativists are thoroughgoing relativists is hardly to refute relativism, but such a showing does tend to establish the initial center of intellectual gravity, which may be relevant to any ultimate pragmatic judgment we may care to make. The essay then considers the unattractive and apparently unavoidable limitations on the scope of moral discourse imposed by moral relativism. From there, the essay discusses the literature focusing upon relativism's dubious value in distinctively resolving the twin problems of tolerance and intolerance of the actions and beliefs of other persons. Finally, the essay more broadly discusses the question of relativism and the uncertainty, disputedness, diversity and plurality of normative moral claims and beliefs. The essay finds no grounds for preferring moral relativism, or for thinking it logically unavoidable, that are sufficient to negate its pragmatic costs.

All this would be academic from the jurisprudential standpoint, however, if the courts, and in particular the contemporary Supreme Court, were uninfluenced by and did not engage in legal relativism. While, as we have suggested, the unequivocal detection of legal relativism is usually difficult, some progress

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9. Twentieth century emotivism would appear to fit neatly within this category. *See* A.J. AYER, LANGUAGE, TRUTH AND LOGIC (2d ed. 1946); C.L. STEVENSON, ETHICS AND LANGUAGE (1944); J. URMSON, THE EMOTIVE THEORY OF ETHICS (1969).

can be made. The section immediately below examines in particular the Rehnquist Court precedent of *Pope v. Illinois*,[10] a 1987 case discussing the elements of obscenity, and concludes that despite Justice Blackmun's strictures quoted above,[11] the contemporary Supreme Court has not avoided the temptations of legal relativism. This, in turn, makes our consideration of legal relativism below, and the essay's eventual pragmatic rejection of legal relativism, all the more important.

II. *POPE V. ILLINOIS* AND THE DETECTION OF LEGAL RELATIVISM

In *Pope v. Illinois*,[12] the Rehnquist Court sought to clarify a point of law left unresolved in the well-known obscenity case of *Miller v. California*.[13] It will be recalled that in *Miller*, the Court had imposed the following three-part test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person applying contemporary community standards" will find that the work taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[14]

It had been settled by the time of the *Pope* case that the first two elements of this test, appeal to prurient interest and patent offensiveness, were to be determined with ultimate reference to contemporary community standards.[15] The principal issue in

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10. 481 U.S. 497 (1987).

11. *See supra* note 3 and accompanying text.

12. 481 U.S. 497 (1987).

13. 413 U.S. 15 (1973).

14. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)) (citations omitted).

15. 413 U.S. at 24, 30 (discussing the prurient interest prong); Smith v. United States, 431 U.S. 291, 301 (1977) (determining that "the jury must measure patent offensiveness against contemporary community standards"). *See also* United States v. Obscene Printed Matter, 668 F. Supp. 50, 53 (D. Mass. 1987) ("The first and second prongs of the *Miller* test . . . are to be decided with reference to contemporary community standards."). As the government bears the burden of proof on all three elements, *id.*, the *Miller* formulation implies that if the government cannot show that sufficiently clear community standards exist, as it may not be able to do, the material is constitutionally protected. *See* State v. Kam, 68 Haw. 631, 633, 726 P.2d 263, 265 (1986).

Pope focused on the proper method, under the free speech clause of the Constitution, of determining the third, or "serious value" prong.

The petitioners in *Pope* had argued at trial that the third or "serious value" prong of the *Miller* test should be determined not on the basis of reference to contemporary community standards, but "solely on an objective basis."[16] This argument was rejected at the trial level in favor of recourse to the standards of ordinary adults throughout the state of Illinois.[17] The Rehnquist Court, through Justice White's opinion for the majority, held that the trial court's instruction to apply contemporary community standards in determining the presence or absence of "serious value" in the allegedly obscene material was unconstitutional.[18]

The essence of the Court's discussion on "serious value" ran as follows:

> "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.[19]

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16. 481 U.S. at 499.

17. *Id.* The Court in *Miller* had permitted, but not required, selection of the entire state of California as the relevant "community" insofar as the obscenity inquiry required recourse to community standards. *See* 413 U.S. at 30-34. The courts have substantial latitude in further restricting the size and scope of the relevant community to a more local, idiomatic "community" as variously defined. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 106 (1974); Jenkins v. Georgia, 418 U.S. 153, 157 (1974); United States v. Bagnell, 679 F.2d 826, 835-36 (11th Cir. 1982) (jury instruction applying contemporary standards of Dade County, Florida not erroneous for failure to include nearby Fort Lauderdale), *cert. denied*, 460 U.S. 1047 (1983).

18. 481 U.S. 497, 501 (1987).

19. *Id.* at 500-01 (quoting Miller v. California, 413 U.S. 15, 34 (1973)) (citation omitted).

In a footnote, the Court added that "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met."[20]

Now, it is undeniable that the Court does not generally confront—and does not do so in *Pope*—a philosophical question distilled to laboratory purity, or a question to be answered by recourse to philosophy unconstrained by the Constitution. The options available to the Court under the Constitution and under *Miller* did not reduce precisely and unequivocally to a choice between relativist and objectivist methods of determining obscenity cases. Consider, for example, the possibility that some communities would, when asked to apply local community standards to a determination of value, conclude that local community standards themselves would require recourse to the standards of a broader community, or even to what the community conceived of as distinct, objective standards. Nor would the Court necessarily focus on relativism versus objectivism if it were concerned essentially with the degree of tolerance to be accorded allegedly obscene materials.

Making all due allowance for the fact that constitutional opinions are not unconstrained essays in metaethics, it is still possible to discuss responsibly the roles of relativism and objectivism in the Court's adjudicatory process. The Court apparently wanted to begin its analysis in *Pope* with something like the premise that a work could have the requisite serious value even though a community failed to perceive or recognize that value. Actually, even this premise would not serve as a general criticism of relativism, in that it is perfectly possible for a relativist to recognize that her own community may wrongly apply or interpret its own community standards, or even that the community should be guided not by its own actual standards, but by what those community standards would be as modified by due and informed deliberation.[21] The Court's analysis is perhaps a bit casual in declining to distinguish between a community's disapproving of the ideas expressed in a work and

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20. *Id.* at 501 n.3.

21. For discussion of the view that relativism does not necessarily license whatever the relevant group or community currently happens to believe, see Unwin, *supra* note 2, at 205-11.

the community's failing to perceive the requisite sort of value in the work.[22] It would seem quite natural to disagree with the substantive argument of a political treatise, while conceding its value. For example, most contemporary readers of Thomas Hobbes' *Leviathan* would not "approve of the ideas"[23] expressed in the work. Few, however, would deny that the work has serious political value.

The Court's analysis in *Pope* seems to grope, if a bit awkwardly, toward a recognizably objectivist or expert-based analysis of the "serious value" prong. It will be recalled that the Court held that "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[24] While this formulation is less than entirely felicitous, it is sufficiently determinate to indicate the general thrust of the Court's thinking.

It should first be noted that at no point does the Court countenance any differences in approach to ascertaining the presence of any of the four different sorts of serious value (artistic, literary, scientific or political). An argument could be made, one supposes, that artistic value is less objective, or more community-relative, than scientific value. It might be thought that communities could reasonably dispute the serious artistic value of an item of art in a way that would seem implausible if the issue were the scientific value of the work of Newton or Maxwell. Of course, this example itself does not control for all of the relevant factors. In any event, the Court did not address the possible view that some forms of value are more community-relative than others.

The Court focused on a distinction between the determination of an ordinary person applying that person's own group standards, and the determination of a reasonable person. On initial inspection, there might seem little to choose between these tests, especially if it is borne in mind that the community standards referred to in the first formulation may be as broad, diverse, and heterogeneous as those of the entire state of

22. *See* 481 U.S. 497, 500 (1987).
23. *Id.*
24. *Id.* at 500-01.

California[25] or Illinois.[26] The Court, though, may have had two differences in mind. First, while "ordinariness" and "reasonableness" are sometimes virtually synonymous in the law,[27] the Court's switch from the language of an ordinary person to that of a reasonable person may have been intended to more clearly legitimize recourse to the views of presumed experts on literary, artistic, political, and scientific value. Second, the Court may have sought to mandate reference to the views of an idealized person who has been abstracted from any community, or whose views are not dependent upon the views on the precise question at issue held by any community. Independence of morality from the views of any particular community or group is, as we have seen, at least strongly suggestive of a repudiation of moral relativism.[28]

The inference that the Court had both the "recourse to expertise" and the "independence of community" notions in mind is strengthened by the Court's observation that "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met."[29] The Court may have been driving at something like an "expertise-based veto" of obscenity prosecutions, based solely on expert testimony on the third, or "serious value" prong. The Court explicitly held open the possibility that "prevailing local views" on a work's value may not be reasonable.[30] The views of the people of the entire state of California or Illinois may, on this reading, be constitutionally irrelevant if contrary to the evidence of an independent critic.

The Court in *Pope* did not explicitly address the problem of resolving conflicting expert testimony in this area. It is at least

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25. *See* Miller v. California, 413 U.S. 15, 30-34 (1973).

26. *See* Pope v. Illinois, 481 U.S. 497, 499 (1987). For the view that "reasonable person" standards and "entire state community" standards will be practically identical, see *id.* at 504 (Scalia, J., concurring).

27. Consider, for example, the standard of ordinary or reasonable care, as applied by ordinarily prudent or reasonable persons, in the common law of tort negligence. *See, e.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984). For a careful exposition of the multiple senses of reasonableness of belief, see R. SWINBURNE, FAITH AND REASON 45-54 (1981).

28. *See supra* notes 6-9 and accompanying text.

29. 481 U.S. at 501 n.3.

30. *Id.*

logically conceivable for a widely recognized expert to conclude that a particular work lacks, say, serious artistic value. What is to be done, judicially, if her colleague differs? Both, presumably, could be reasonable persons in this context.[31] The problem of division among experts looms largest in some of the most important cases.

Unfortunately, the opinion of the majority in *Pope* is not particularly clear at this point. The Court carefully asserts that the proper inquiry is whether a reasonable person "would" find the requisite value in the work.[32] The Court repeats in a footnote that the legal standard must focus on whether a reasonable person "would" differ with presumably less tolerant local community views.[33] Without putting undue literalistic pressure on the Court's language, one is inclined to conclude that if reasonable persons, or experts, differ in a particular case, it cannot be said that a reasonable person "would" find the requisite value. If we assume, as we must, that the Court intended a liberalizing, speech-protective test, we are led to wonder why the Court did not simply substitute "might" or "could" for the logically much more demanding "would."[34]

It is possible that the Court majority avoided the obvious language—that a reasonable person *might or could* find the necessary serious value—because of their own less than robust faith in the objectivity of such value determinations, or because

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31. For the view that a shared quality of reasonableness among evaluators does not guarantee unanimity or agreement, in a separate free speech context, see American Postal Workers Union, AFL-CIO v. United States Postal Serv., 830 F.2d 294, 314-15 (D.C. Cir. 1987) (Ginsburg, J., concurring).

32. 481 U.S. at 501.

33. *Id.* at 501 n.3. Note that Justice Blackmun's separate opinion, doubtless intended to be strongly speech-protective, oddly uses weak language to the effect that "even a minority view among reasonable people that a work has value *may* protect that work from being judged 'obscene.'" *Id.* at 506 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

34. This problem, by the way, could not have been overlooked by the Court majority, as it was explicitly called to their attention by Justice Stevens. *See id.* at 511 (Stevens, J., dissenting). It is possible, since the burden of proof on all three prongs of the *Miller* test remains on the prosecution, see United States v. Obscene Printed Matter, 668 F. Supp. 50, 53 (D. Mass. 1987), that the Court majority intended that the material be protected unless the prosecution could show that no reasonable person would ascribe the requisite serious value to the work in question. If so, this intention was expressed with less than exemplary clarity.

of their fear that relativism and subjectivism in such matters were not subject to sufficient judicial control. The Court may in particular have feared that the answer to the question "could a reasonable person find serious artistic value in the work in question" will always, or nearly always, be yes,[35] or at least that the contemporary inclination to think so would not be judicially controllable. This is at least legal relativism, if not subjectivism, and the spectre of legal relativism, therefore, cannot be exorcised even from the apparently objectivist approach taken by the *Pope* majority to the third element of the *Miller* test.

The influence of legal relativism is clearer, certainly, in the concurring and dissenting opinions in *Pope*, and in the majority's own continuing disinclination to rethink the strongly group-relativist analysis of the first, or prurient interest, prong of the *Miller* test. The overall impression one is left with is that the contemporary Supreme Court has inherited an understanding of obscenity with strong and controversial relativist and subjectivist influences, and that the Court has declined to reshape that understanding so as to repudiate such relativism and subjectivism.

Justice Scalia's concurring opinion in *Pope* is intriguing in several respects. Justice Scalia concurred on the theory that the opinion of the Court reached a result faithful to the logic of *Miller*,[36] but urged a reexamination of the *Miller* standard, essentially along relativist or subjective grounds.[37] Justice Scalia explicitly equated the Court's "reasonable person" test of the "serious value prong" with an "objective" test,[38] and argued

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35. *Cf.* Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946) ("What seems to one to be trash may have for others fleeting or even enduring value."). This conclusion is reached, at least with regard to literary and artistic value, by Justice Scalia. 481 U.S. 497, 505 (1987) (Scalia, J., concurring). *See also* Kucharek v. Hanaway, 714 F. Supp. 1499, 1510 (E.D. Wis. 1989) ("Long before deciding *Miller*, the Supreme Court explicitly recognized that individuals' perceptions of what constitutes literary, artistic or educational value will inevitably vary widely.").

36. *See* 481 U.S. 497, 504 (1987) (Scalia, J., concurring).

37. *Id.* at 505 (Scalia, J., concurring).

38. *Id.* at 504 (Scalia, J., concurring). *See also* American Postal Workers Union, AFL-CIO v. United States Postal Serv., 830 F.2d 294, 323 (D.C. Cir. 1987) (Bork, J., dissenting) (concluding that a "reasonable reader" standard is far more predictable and less subjective than the standards of appellate judges at the time of the writing in question). An apparent equation of "reasonable person" and "objective" standards is made in Kucharek v.

that at least with regard to questions of literary and artistic value, such matters amounted merely to disputes about personal taste.[39] In this context, Justice Scalia maintained, "the fabled 'reasonable man' is of little help in the inquiry, and would have to be replaced with, perhaps, the 'man of tolerably good taste'—a description that betrays the lack of an ascertainable standard."[40] Justice Scalia concluded that "we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it."[41]

The tendency on the part of Justice Scalia and others to equate reasonableness and objectivity is perhaps understandable, but in this context is clearly mistaken. The idea of reasonableness itself is not unequivocal.[42] But on most understandings, reasonable decisionmaking, or the reasonableness of the decisionmaker, do not guarantee anything like objectively correct decisions.[43] A person may be thought reasonable in acquiring certain amounts of specified kinds of relevant evidence and reasonably applying reasonable rules of inference in forming a belief, but that belief may turn out to be plainly, demonstrably, objectively false. A belief in the impossibility of travel to the moon was reasonable a century ago. Only a person who was well-informed and who was thinking with logical rigor could fully appreciate the reasonableness of such a belief. Such a belief could hardly qualify, however, as in any sense objectively true.

It seems fair to conclude from our examination thus far of *Pope* that neither the majority opinion nor those of the remaining Justices can be adequately accounted for without reference to

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Hanaway, 714 F. Supp. 1499, 1510 (E.D. Wis. 1989) ("Like the other terms set forth in *Miller*, 'educational' can be applied objectively under a reasonable person standard.").

39. *See* 481 U.S. 497, 504 (1987) (Scalia, J., concurring). *Cf. id.* at 506 (Blackmun, J., concurring in part and dissenting in part) ("Reasonable people certainly may differ as to what constitutes literary or artistic merit.").

40. *Id.* at 505 (Scalia, J., concurring).

41. *Id.* (Scalia, J., concurring). The dissenting opinion of Justice Stevens, joined in relevant respects by Justices Marshall, Brennan, and Blackmun, adopted a similar relativism or subjectivism of value determinations. *Id.* at 512-15 (Stevens, J., dissenting).

42. *See* Osborne v. Ohio, 110 S. Ct. 1691, 1711 (1990) (Brennan, J., dissenting).

43. *See* R. SWINBURNE, *supra* note 27, at 45-54.

the pull of contemporary relativism and subjectivism. This is perhaps unsurprising. Even then-Associate Justice Rehnquist, in the role of theorist, concluded some time ago that "[t]here is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa."[44] But the influence of legal relativism is also evident not only in what *Pope* does, but in what it does not do, or in what it leaves alone and unquestioned.

In particular, *Pope* does not challenge the clear relativist, and perhaps even subjectivist, elements that have pervaded the judicial understanding of obscenity since *Miller*. Whether we think of the "serious value" inquiry mandated by *Pope* as influenced by relativism or not, it is clear that the first two prongs of the *Miller* test, referring to "prurient interest" and "patent offensiveness," remain essentially a matter of recourse to group or community valuational standards.[45] In a federal system, such determinations would be relativist on their face.

Yet it is important to appreciate that a relativist interpretation of, for example, an appeal to a prurient interest in sex is hardly inevitable. Prurience has been defined by the Court as involving an appeal to a "shameful or morbid interest in sex,"[46] and the Court has clearly and explicitly sought to distinguish in this context between what it referred to as "normal, healthy sexual desires"[47] and, presumably, abnormal or unhealthy sexual desires.

Now, it is quite possible to interpret these concepts, and particularly that of shamefulness, in a group or community-relative way. What is shameful might amount to no more than what some relevant reference group considers to be shameful. But it is also perfectly possible to think of terms such as healthiness, morbidity, and even shamefulness in ways that at least partially transcend reference to group norms. It is at least possible to conceive of something as, perhaps, universally,

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44. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

45. *See* United States v. Pryba, 674 F. Supp. 1504, 1506 n.7 (E.D. Va. 1987). That the standards are to be group-relative, and not merely personal to each decisionmaker, or in our sense "subjective," is recognized in United States v. Obscene Printed Matter, 668 F. Supp. 50, 53 (D. Mass. 1987).

46. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (citing Roth v. United States, 354 U.S. 476 (1957)).

47. *Id.* at 498.

objectively, "really" healthy, or, more simply, as healthy whether such healthiness is recognized or not.

Such an objectivist approach is at least a logically possible option. And it is vital, in ultimately making the choice, to avoid assuming that relativist interpretations of sexual healthiness or morbidity must, in the spirit of the Constitution, be broadminded, tolerant, expansive, and generally libertarian, while objectivist interpretations of sexual healthiness must be narrow, restrictive, and generally repressive. As we shall more broadly note below, there is certainly no necessary association between relativism and tolerance, or between objectivism and intolerance.[48] It is perfectly possible to conclude that the proper understanding of sexual healthiness is an objective understanding, and that the substance of such an objective understanding is libertarian.

The Supreme Court, however, has consistently adhered to a relativist, or community standards-based, interpretation of the prurient interest and patent offensiveness prongs of the test for obscenity.[49] It is difficult to avoid the conclusion either that the Supreme Court has simply chosen the course of moral relativism in this respect, or that the Court thinks, correctly or incorrectly, that the Constitution or the binding case precedents themselves objectively mandate applying the logic of relativism in this context. Whether the Constitution itself not only permits, but requires, that issues of obscenity be decided in a relativist way seems generally doubtful,[50] but this is an issue we may for present purposes set aside. In any event, the influence of legal relativism on contemporary Supreme Court constitutional jurisprudence makes our consideration below of the merits of legal relativism of inescapable importance.

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48. *See infra* notes 79-82 and accompanying text. For a recent statement in another context of the values of pluralism and tolerance, see Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (1989) (Brennan, J., dissenting).

49. *See* Miller v. California, 413 U.S. 15, 24 (1973); *see also* United States v. Obscene Printed Matter, 668 F. Supp. 50, 53 (D. Mass. 1987) (applying community standards on the first two *Miller* elements, and then going on to determine, under the third, or "serious value" prong, that the "reasonable" person in the United States is unable to read Swedish photograph captions, thereby implying that bilingual Swedish-Americans are, in this context, other than reasonable).

50. For an "originalist" start on these issues, one might begin with the sources cited *supra* note 4. For a sense of the early Enlightenment awareness of the observed variability of moral codes, see P. HAZARD, THE EUROPEAN MIND 288-89 (1968).

III. Is Legal Relativism Expedient?

Relativism, it seems fair to conclude, is to one degree or another entrenched in at least some segments of contemporary Supreme Court constitutional jurisprudence. This section therefore poses a question that makes up in practical importance what it lacks in technical philosophic elegance: Is legal relativism a distinctively good thing, even from the standpoint of many of those most initially sympathetic to its apparent advantages? Again, one hardly refutes legal relativism by exposing features of legal relativism that tend to be unattractive to even the doctrine's sympathizers, or by exposing its apparent advantages as largely illusory. Our aim, though, is not to refute legal relativism, but, by displaying its unattractiveness, to promote a thinning of the crowd in its tent.

A. The "Weakness" of Academic Moral Relativism

It may be surprising, in this age of relativism, that the number of widely reputed contemporary moral philosophical relativists who could reasonably be called "strong" or "thoroughgoing" relativists is quite small. Certainly, most of the best-known academic relativists would not so qualify.[51] Professor Gilbert Harman's well-known and gradually developed theory of moral relativism, for example, is explicitly confined to what Harman refers to as "an important class"[52] of moral judgments. Harman wants to apply relativist standards to judgments such as that a person "ought not to have acted in a certain way or . . . that it was right or wrong of him to have done so."[53] While this might initially suggest a repudiation of moral objectivity, Harman immediately specifies that, for reasons that need not detain us here, his "relativism is not meant to apply, for example, to the judgment that someone is evil or the judgment that a given institution is unjust."[54] Presumably, this is the sort of judgment

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51. This phenomenon was pointed out at least with regard to two leading contemporary academic exponents of moral relativism, Bernard Williams and Gilbert Harman, by Professor Heidi M. Hurd in Note, *supra* note 6, at 1505.

52. Harman, *Moral Relativism Defended*, in Relativism: Cognitive and Moral 189, 189 (M. Krausz & J. Meiland eds. 1982).

53. *Id.* at 190.

54. *Id.*

we ask the courts of law to make in appropriate cases. As well, Harman's relativism does not apply to the judgment, say, that a given action was morally wrong, or that it is morally wrong that there be so much of that particular kind of action.[55] As to the comparative plausibility of moral relativism and what he refers to as "moral absolutism," Professor Harman has diffidently concluded that "I see no knockdown argument for either side."[56]

A similar, if not precisely parallel, restraint is displayed by other leading academic moral relativists. The well-known contemporary philosopher, Professor Philippa Foot, for example, is willing to concede the objective immorality of certain actions while maintaining the modest claim that there are some moral issues, even if the number of such issues is unclear,[57] on which there is irreducible moral disagreement.[58] Similarly, Professor David Wong is attracted to the principle of "the unconditional acceptance of equal human worth,"[59] and recognizes the rational solubility of some unspecified percentage of moral disagreements.[60] Professor Wong's reiterated claim that "there is no single true morality"[61] is, as we shall briefly discuss below, certainly compatible with a view of the moral world that is strongly objectivist in character.

Professor Richard Brandt's well-known theory of moral relativism similarly builds on certain common, if not universal, forms of human good and of moral offense,[62] and ultimately

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55. *Id.* at 192. *See also* Copp, *Harman on Internalism, Relativism, and Logical Form*, 92 ETHICS 227, 228 (1982) (discussing Harman's distinctions in this respect).

56. Harman, *Is There a Single True Morality?*, in RELATIVISM: INTERPRETATION AND CONFRONTATION 363, 385 (M. Krausz ed. 1989).

57. *See* Foot, *Moral Relativism*, in RELATIVISM: COGNITIVE AND MORAL, 164, 164 (M. Krausz & J. Meiland eds. 1982).

58. *Id.* at 163.

59. D. WONG, MORAL RELATIVITY 9 (1984).

60. *See* Wong, *On Moral Realism Without Foundations*, 24 S.J. PHIL. 95, 95 (1986) ("many moral disagreements are irresolvable"). I shall at this point simply assume that the presumed fact that at least some moral disputes are not rationally resolvable counts strongly against any theory of the objectivity of morals, though this is certainly contestable.

61. D. WONG, *supra* note 59, at 1; Wong, *supra* note 60, at 95.

62. *See* R. BRANDT, A THEORY OF THE RIGHT AND THE GOOD 242 (1979); Brandt, *Relativism Refuted?*, 67 MONIST 297, 305-06 (1984).

suggests that even those moral issues we now regard as most intractable, including those typically presented in one fashion or another to the courts of law, may have a single right and consensually achievable answer.[63] A somewhat different, but ultimately no more ambitious, version of limited moral relativism is offered as well by Professor Bernard Williams.[64]

It seems fair to conclude that the most plausible versions of moral relativism make striking, if not disarming, concessions to moral objectivism.[65]

B. Relativism and the Evacuation of Moral Language

The willingness of advocates of moral relativism to make concessions is not surprising. For even those with strong relativist inclinations in some contexts will unavoidably tend to find the language of moral relativism inadequate in other contexts. Relativism sets limits to moral and jurisprudential discourse to which most of us do not consistently adhere. The result is that the advocates of moral relativism are not always true to their own standards.

It does not matter whether we choose to call this an argument *ad hominem* or not. Some *ad hominem* arguments are essentially personal and ultimately trivial, but others are not. The argument that the relativist ultimately finds relativism inadequate is of the latter sort. It is not merely that our moral heroes transcend

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63. *See* R. BRANDT, *supra* note 62, at 241-43; Brandt, *supra* note 62, at 306.

64. *See* Williams, *The Truth in Relativism*, in RELATIVISM: COGNITIVE AND MORAL, 175, 183-84 (M. Krausz & J. Meiland eds. 1982) (distinguishing between situations of genuine, as opposed to merely "notional," confrontation between moral systems).

65. In addition to the instances discussed above, one might consider in this context the conclusion of Professor J.L.A. Garcia that what he takes to be one of the most cogent versions of moral relativism "is logically compatible with theses that philosophers have seen as expressing the view that morality is not 'relative,' but 'objective.'" Garcia, *Relativism and Moral Divergence*, 19 METAPHILOSOPHY 264, 274 (1988). The interesting, if controversial, argument has been made that one unavoidable limit on the extent to which our moral beliefs can be only relatively true is that if we encountered a set of beliefs and practices too thoroughly divergent from our own, we would most reasonably infer not radical moral disagreement, but either our misunderstanding of, or the non-moral character of, those foreign beliefs. *See* Cooper, *Moral Relativism*, 3 MIDWEST STUDIES IN PHIL. 97, 101 (1978).

relativism, though this is clearly true. We cannot, for example, imagine a Nelson Mandela, a Bishop Tutu, a Natan Sharansky, an Alexander Solzhenitsyn, or a Vaclav Havel observing sagely that what is right for the South African regime, or the KGB, or the Czech Communist Party bureaucracy may not be right for those they oppress.[66]

More importantly, the logic of moral relativism, to the extent that it does not simply accommodate moral objectivism, bars us from making moral judgments we reasonably feel entitled to make.[67] We are not content, and have no reason to feel we must content ourselves, with hunting for internal inconsistencies within Nazism or racism, or looking merely for factual errors underlying such ideologies, or merely pointing out, say, that the principles of Nazism "are inconsistent with those of our ethical tradition."[68]

Even after Professor Harman, for example, has made his concessions to objectivist morality, it remains true that he has left moral language unnecessarily hobbled. In Harman's view, given a person who faces a choice between saving or not saving, at some minimal personal cost, a number of innocent lives, where the potential rescuer has no other direct or indirect short or long-term stake in the consequences of or reactions to the choice, we are disabled from saying precisely that the person would do moral wrong in choosing not to effect the rescue.[69]

C. *Relativism and Moral Practice*

The fundamental problem with moral relativism, though, is not simply its constriction of our language, but its recognized and unrecognized indirect long-term effects on moral—and legal—practice. It is not difficult to imagine that a society experiencing

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66. For a sense of the indispensability of an objectivist language of morals to Havel's message, see, e.g., V. HAVEL, POLITICS AND CONSCIENCE (1986); Havel, *The Power of the Powerless*, in THE POWER OF THE POWERLESS 23 (J. Keane ed. 1985).

67. For a statement of this point with respect particularly to the relativism of Professor Bernard Williams, see Note, *supra* note 6, at 1493.

68. Sapontzis, *Groundwork for a Subjective Theory of Ethics*, 27 AM. PHIL. Q. 27, 35 (1990).

69. For relevant background on Harman's theory, see Wiles, *supra* note 2, at 787-88. The example in the text happens to be of a putative "positive" as opposed to "negative" moral duty, but is just as easily stated, and just as true, in the latter sorts of cases.

an evaporation of the perceived objectivity of morals and the development of distinctive group-based relativist moralities will tend to be less legally governable.[70]

No doubt this process may have positive and progressive elements, including a relaxation of oppressive uniformity, but loss of governability has negative elements as well. Most of us are reluctant to abandon the idea that morality should function not only to legitimize the claims of established and evolving groups, but also to regulate and at least occasionally restrain the assertion of group-based interest.[71] It is implausible to imagine that a group-based morality would in practice tend to distinctively foster group self-restraint, or to inhibit the development of a "zero-sum" gaming mentality to the extent that even most of the groups involved would tend to think desirable. It is admittedly technically conceivable that a thoroughly relativist society could consist entirely of numerous groups with partially conflicting interests, where every single group adopted, for itself, a morality of appropriate sacrifice and restraint by the group itself with respect to its dealings with other groups. Such a state of affairs, however, does not seem likely or stable in practice.

Relativism thus cannot offer much of what we want a morality to be able to do, including the principled, satisfactory resolution of inter-group conflicts. This is exhibited in section D below, which discusses relativism's utter indeterminacy in the face of the question of tolerance. But it should not be assumed that relativism would likely provide a solid, stable foundation for the satisfactory[72] resolution of moral disputes within the relevant groups. At least in our own historical context, there is no obvious reason to suppose that moral relativism is likely to "work" in a satisfactory way over the long term even within the particular group in question.

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70. *Cf.* Frankena, *Is Morality a Purely Personal Matter?*, 3 MIDWEST STUDIES IN PHIL. 122, 129-30 (1978) ("It seems clear that, where there is no prevailing moral code, a legal system will have very hard going, even in totalitarian countries.").

71. *But cf.* Harman, *Relativistic Ethics: Morality as Politics*, 3 MIDWEST STUDIES IN PHIL. 109, 115 (1978) ("Morality is . . . continuous with politics.").

72. By "satisfactory," I mean to exclude any moral code whose stability is purchased through coercion, narrow indoctrination, or any high technology version of thought control.

The practical instability, in our historical circumstances, of any satisfactory moral relativism is obviously not subject to rigorous logical demonstration. It is tempting to think of relativism, or today's common arbitrary mixture of objectivism and relativism according to the tastes of the believer, as a sort of psychological way-station between a moral objectivism of the past and a succession of moral subjectivism, moral noncognitivism, and eventual moral entropy in the future.[73] For present purposes, though, we need not make a claim of this breadth.

The less ambitious, but still admittedly unprovable, claim that should be made is that relativism will tend to be inadequate even for conflicts within any particular group because relativism is not, as a matter of logic and psychology, very good at something we want a morality to be good at. Specifically, relativism is not very good, in the long run, at changing minds, changing behavior, and influencing even fellow group members to regularly act contrary to their untutored inclinations or their perceived, immediate interests.[74]

One writer has summarized the point by arguing that

> moral judgments and moral considerations have a considerable influence on human affairs. They often influence people's attitudes and actions. It is doubtful that they could have this kind of causal efficacy unless they purported to be objectively correct. Why, for instance, should a man's judgment that it is wrong for him to continue to expect his wife to do all the housework cause him to change, unless he took it to imply that his attitudes are incorrect?[75]

Of course, acceptance of a moral judgment as objectively correct hardly guarantees that we will be motivated to act in accordance

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73. For a brief discussion of the instability in practice of sophisticated versions of moral pragmatism, see R.G. WRIGHT, THE FUTURE OF FREE SPEECH LAW 255-65 (1990).

74. This point certainly need not exhaust the function of morality, and it need not be taken to imply that morality is solely and exclusively a functional institution. We need not be what Professor Sayre-McCord refers to as "moral instrumentalists" to appreciate this point. *See* Sayre-McCord, *supra* note 6, at 5.

75. *See* Carson, *supra* note 6, at 17.

with that judgment.[76] The problem can be restated in terms of why one would form, or continue to adhere at some cost, to the moral judgment in the first place.

On an objectivist analysis of the housework example quoted above, it may be simply, inescapably, morally wrong, hence wrong overall (or with all relevant factors duly considered) to expect one's wife to do all the housework.[77] If so, the husband is simply bound, despite his interests or inclinations, until he changes his situation or that of his wife in some objectively morally relevant and sufficient way; e.g., by his taking a second job to pay for a third party's professional cleaning services. On a noncognitivist analysis, on the other hand, it is neither true nor false that the husband should lift a finger. The view that he should is no more objectively reasonable or required than the view that he should not. Merely prudential considerations and force of habit aside, why, as a matter of reason, should a husband continue to adhere to any moral rule with no particular linkage to truth or moral reality, if it is inconvenient to do so?

It may be thought that moral relativism, as opposed to noncognitivism, is made of sterner stuff. At the very least, a fellow group member could inspire or chastise the husband on the grounds that the morality shared by their group required helping with the housework. It would be simply, inescapably true that group members in good standing, perhaps for reasons enumerated by the group's moral code, help with the housework.

But this response merely raises the problem of group definition, group jurisdiction, and defection. If there is an objectively true morality binding all persons, or all human or rational beings, no one within its scope can necessarily simply opt out. One cannot, rationally, step aside and adopt some other set of moral conventions, foreswearing the burdens and benefits of objective morality. Relativism, however, has a much tougher time with the problem of largely self-interested defection. What is irrational or inconsistent about the husband announcing that, at least on this occasion, he is to be considered not as a member of Group

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76. For a thorough discussion of a number of issues bearing on moral judgments and motivation, see D. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989).

77. We are at this point setting aside as an unnecessary complication the possibility of objective but merely prima facie or defeasible moral obligations.

A, which believes in sharing household responsibilities, but as a member of some other relevant Group B, which does not?

After all, each of us belongs to many partially overlapping groups and communities.[78] Our membership in some is easily alterable, in others not. Even among those groups or communities in which group membership is difficult to change, such as those of geography, social class, or ethnic group, there may well be conflicts. All may have something to say about housework. Why not simply announce that for household maintenance purposes, one will henceforth look to the norms of a group defined, say, by arguably relevant gender, class, regional, and age norms under which household assistance by the husband may be optional or episodic? Someone who makes this choice is not giving up morality in general, or relativist morality in particular, or demanding to know why he should be moral. He is simply opting for the apparently relevant norms of one arguably relevant group over those of another.

Now, it is possible that groups more sympathetic to the interests of the wife, and to which the husband has at least in some sense belonged, may question the propriety of the husband's choice. They may point to their rules about defection from the particular group, or about group membership generally, or about what to do in cases of conflicts with group norms endorsed by other groups to which their members may also belong, if they recognize the possibility of multiple group membership. The husband may inescapably be violating some of those rules. But his situation may be such that he cannot avoid violating some such rule of some group of which he considers himself a member. And we must ask, more generally, about those identification, exit, and conflict rules of each particular group: are such rules binding only for, or within, the group itself, and not objectively rationally binding? If so, they are of little use. Why not defect from these rules as well? If, on the other hand, these sorts of rules are thought to be objectively binding, we need some account of how normative moral relativism squares with objective boundary-maintenance rules about when to follow one rather than another set of apparently conflicting moral rules.

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78. *See* Lyons, *Ethical Relativism and the Problem of Incoherence*, 86 ETHICS 107, 110 (1976).

D. Relativism and Tolerance

Thus far, it would seem, moral relativism has shown itself to be of perhaps surprisingly limited general appeal. It might be argued, though, that relativism somehow offers compensating advantages. Some, if not all, of history's villainously intolerant personages would have subscribed to moral objectivism in one form or another. It therefore might be supposed that whatever its disadvantages, moral relativism offers us a special likelihood of the degree or kind of tolerance, in practice, that most persons would find appropriate.

On the contrary, it is fair to say that there is no distinctive or determinate relation between moral relativism on the one hand and tolerance, noninterventionism, or moral *laissez faire* in general. It may be true, as Professor David Brink argues, that relativists cannot regard normative moral attitudes differing from their own "as mistaken, provided those attitudes reflect the moral beliefs of those who hold them or perhaps, the moral beliefs of the group of which those who hold them are members."[79] On this view, intolerance among relativists cannot logically be due to their belief that those with opposing normative beliefs are mistaken, at least in their consistent, factually well-grounded moral beliefs. But intolerance need not be grounded in perceived falsity of an opposing belief. Intolerance can just as well be grounded in the belief that it suits one's own individual or group interest to be intolerant. If intolerance is not thought objectively wrong, why not pursue a course of intolerance within a group, or with respect to opposing groups, as long as it seems prudent or amusing to do so?

Relativist intolerance is therefore not likely to be an ardent, passionate intolerance, but one born of uninhibited, uncharitable individual or group interest or other motivation. It is possible to argue that one of these types of intolerance is worse, in our historical context, than the other, but we could not make a definitive judgment on whether objectivism or relativism in general tends to accommodate better our sense of the proper role of tolerance without knowing much more; we would need to know the degree of propensity for intolerance, or the frequency of intolerance, under relativism. Also to be factored in, of

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79. *See* D. BRINK, *supra* note 76, at 92.

course, would be any incidence under moral relativism of tolerance where most of us think tolerance would be inappropriate. For instance, there is nothing in principle to prevent the relativist from determining that what is right for one society may not be right for Stalinist Russia, or Hitler's Germany, or South Africa.

Ultimately, the relationship between relativism and either inadequate or excessive tolerance is utterly indeterminate in principle. More particularly, relativism does not provide a distinctively natural and accommodating home for tolerance of the right sort. As Professor David Brink has observed, "neither noncognitivism nor relativism seems to have any special commitment to tolerance. If no one moral judgment is any more correct than another, how can it be that I should be tolerant?"[80]

This is not to suggest, of course, that the history of moral objectivism has been the history of either overflowing or appropriate tolerance. But there is certainly no obvious reason why a believer in the objectivity of morals, such as John Milton[81] or John Locke[82] and their successors, cannot consistently counsel tolerance. There are any number of reasons for a moral objectivist to adopt strong principles of tolerance. Among the most obvious would be inevitable human fallibility, factual ignorance, a concern for individual human dignity or equality, sensitivity to context and to the act of moral choice itself by persons, and a concern for the role of love or empathy in an objectively true morality. Of course, any given moral objectivist might reject all of these possible grounds for tolerance. But the issue at this point is whether relativism can, in light of its disadvantages, be rehabilitated, and the issue of tolerance offers no clear reason for preferring moral relativism.

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80. *Id.* at 93. *See also* Devine, *supra* note 6, at 407 ("Relativists need be no more tolerant than others, and have special reasons for being intolerant."); Hocutt, *Must Relativists Tolerate Evil?*, 17 PHIL. F. 188, 197 (1986); Williams, *supra* note 64, at 173 ("If we are going to say that there are ultimate moral disagreements between societies, we must include, in the matters they can disagree about, their attitudes to other moral outlooks."); Note, *supra* note 6, at 1464.

81. *See* J. MILTON, AREOPAGITICA (C.E. Vaughan ed. 1951).

82. *See* J. LOCKE, *A Letter Concerning Toleration*, in JOHN LOCKE ON POLITICS AND EDUCATION 17, 24 (1947).

E. *Relativism, Moral Variety, and Moral Disputedness*

One possible response to all of the frankly pragmatic sorts of arguments sketched above is to remind us that a doctrine such as relativism may be true even if it is not advantageous or even attractive. This is doubtless an important point. It is not, however, susceptible to being explored within the compass of this essay. We should spend at least a moment, however, on the commonly held thesis that the sheer uncertainty, variety, and the continuing disputed truth or falsity of normative moral claims tend to impeach objectivism, and that on that basis, relativism is more probably true.[83]

Certainly, some of the most familiar observations made by relativists in this context seem plausible. Sometimes, there seems to be no further standard by which to adjudicate between competing normative moral claims.[84] A case of some sort can be made on the grounds that "different people are subject to different basic moral demands depending on the social customs, practices, conventions, values, and principles that they accept,"[85] that "many moral disagreements are irresolvable,"[86] and that "there is no single true morality."[87]

One of the most useful objectivist responses at this juncture is not to deny such phenomena as the persistence of unresolved moral disputes, but to deny that insofar as they describe real, observable phenomena, they constitute a reason for preferring relativism to objectivism. It may well be that mainstream objectivist moral theories can account just as naturally and plausibly for what is true in the claims about variety and contestedness in moral practice as can moral relativism.

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83. For a number of arguments questioning the sufficiency of unalloyed moral objectivism, see, e.g., Loder, *Moral Skepticism and Lawyers*, 1990 UTAH L. REV. 47, 68-77. Referring at least to particular kinds of theories of moral objectivism, Professor Frank Snare has concluded that "for many purposes our rough, intuitive, common sense notions are sufficient to tell us that the empirical diversity alleged by some anthropologists, at least, is quite sufficient to undermine serious claims about a moral sense or moral secondary qualities." Snare, *The Diversity of Morals*, 89 MIND 353, 354-55 (1980).

84. *See* Devine, *supra* note 6, at 409.

85. Harman, *supra* note 6, at 371.

86. Wong, *supra* note 60, at 95.

87. *Id.*

Moral objectivism is compatible with a recognition of individualism and the diversity of actually adopted moral codes,[88] and with the view that moral judgments must be "relativized" to the relevant circumstances or context to which the judgment is to be applied.[89] Furthermore, moral objectivism need make no claim that every agonizing moral quandary must have a single knowable best answer. A recognizably objectivist morality, or a morality that is, for example, as objectivist as science,[90] need not deny the persistence of moral conflict of opinion,[91] and need not claim uniqueness or universality for true moral beliefs in an unnecessarily strong sense.[92]

An objectivist morality may, to begin with, not be utterly boundless in its determinate scope. Even a distinctively theistic objective morality, for example, may not speak to all possible sets of choices that might otherwise be thought to pose a problem of moral choice, if, for example, neither of the two particular concrete options have significant implications for salvation, or if both of the two options have the same implications. There is no reason to suppose that an objective morality must guarantee

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88. *See* Wiles, *supra* note 2, at 794.

89. *See* Sapontzis, *Moral Relativism: A Causal Interpretation and Defense*, 24 AM. PHIL. Q. 329, 329 (1987); Wachbroit, *Correspondence: Relativism and Virtue*, 94 YALE L.J. 1559, 1562 (1985).

90. Note that we need not conclude that physics as a whole has become "relativist," or "subjectivist," or "noncognitivist," even when contemporary quantum physicists find what they take to be inherent indeterminacy, beyond merely practical human unknowability, in certain properties of subatomic particles. For useful discussions of the extent to which many quantum physicists assume the indeterminacy of particular properties of particular particles, see, e.g., J. BELL, SPEAKABLE AND UNSPEAKABLE IN QUANTUM MECHANICS (1987); PHILOSOPHICAL CONSEQUENCES OF QUANTUM THEORY: REFLECTIONS ON BELL'S THEOREM (J. Cushing & E. McMullin eds. 1989); P. GIBBINS, PARTICLES AND PARADOXES: THE LIMITS OF QUANTUM LOGIC (1987); J. POLKINGHORNE, THE QUANTUM WORLD (1984); SYMPOSIUM ON THE FOUNDATIONS OF MODERN PHYSICS (P. Lahti & P. Mittelstaedt eds. 1985); d'Espagnat, *The Quantum Theory and Reality*, 241 SCI. AM. 158 (Nov. 1979); Teller, *Relational Holism and Quantum Mechanics*, 37 BRIT. J. PHIL. SCI. 71 (1986); Wright, *Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. U.L. REV. ___ (1990). For a brief discussion of the relation between moral and scientific realism and indeterminacy, see Miller, *Ways of Moral Learning*, 94 PHIL. REV. 507, 509 (1985).

91. *See* Peterson, *supra* note 6, at 887.

92. *Cf.* Wong, *supra* note 60, at 95 ("there is no single true morality").

that in every close call, or in every tragic choice, all answers except one must be definitively illegitimate. It is even possible for an objective morality to accommodate the fact that fallible, ignorant human beings may in at least rare cases face such high information costs in ascertaining a sufficiently specific ultimately best moral principle that the information costs eventually swamp the limited difference in the moral value of, say, the two best choices under the circumstances. Consider, for example, the question of to which of two worthy charities one should donate one's five dollar bill—if one decides not to divide the money.

In fact, there is no reason why even a theistic objective morality could not suppose that God would endow human beings, individually or as groups, with perhaps even the maximum degree of moral law-making capacity compatible with God's nature, qualities, and works, and with the status of humans as subordinate, created beings. Some minimal degree of diversity of moral belief could well enter at that point. Whether, for example, it is morally better to do volunteer work with local hospitalized persons or with a local soup kitchen may not have a single universally true answer, applicable to all alike. This is of course not to argue that the actually correct, objectively true theistic morality can accommodate such elements, merely that some possible objective theistic moralities can.[93]

Nor should the falseness of moral objectivism be inferred from arguments concerning the purported absence, or slowness, of worldwide progress toward uniformity of moral belief.[94] Even if we assume that the objectivity of morals implies that there should be gradual convergence in moral belief, it is hardly clear how one would establish that there has been no or insufficient moral progress or convergence of moral belief. The historically longstanding and widespread institution of slavery has been as nearly abolished as any defunct scientific theory. Free and open elections among a broadly and equally enfranchised electorate are much more common today, across much of the world, than even fifty years ago. Even issues on which persistent disagreement is notorious, such as the propriety of the death penalty, can be

93. For relevant discussion, see B. LONERGAN, INSIGHT 668 (1957); R. SWINBURNE, THE EXISTENCE OF GOD 185-87, 199 (1979).

94. For discussion, see Railton, *supra* note 2, at 195; Wellman, *Ethical Disagreement and Objective Truth*, 12 AM. PHIL. Q. 211, 211-14 (1975).

seen to be narrowing in scope over time, as the class of crimes for which the death penalty is thought appropriate by almost anyone has been dramatically reduced. How one is to take account of these and other examples, along with instances to the contrary, is left mysterious by relativists using this argument against objectivism.[95]

The situation is further clouded by the fact that the moral objectivist might well predict decreasing convergence or uniformity of moral belief in an era such as ours. Ours is a post-colonial world, in which the false or at least premature homogenizing effect of classical colonialism and territorial imperialism arguably has recently been reduced, even while there has doubtless been some homogenization attributable to Western economic institutions and the pervasiveness of Western mass media. But to these perhaps countervailing factors one might add the increasing disparity, in absolute terms, of income and wealth between rich and poor societies.[96]

All in all, it seems difficult to argue definitively that the nature or degree of moral dispute that we observe is incompatible with any sort of moral objectivism. It is still perfectly possible for the moral objectivist to offer to account for the persistence of moral disputes on grounds compatible with moral objectivism. For one thing, there is simply more at stake in the question of what is a fair income tax rate than in, say, how we should characterize the polarization of a photon along a particular axis; and what is at stake are largely conflicting basic interests.[97] Thus persistent moral dispute may reflect not only such factors as "lack of imagination in seeking out arguments,"[98] but unusually strong "temptations to irrationality and lack of perseverance."[99]

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95. Note that if the question of whether objectivism is falsified by moral variety and persisting dispute is not practically decidable, the "default" position with which we are left is a recognition of the overall pragmatic unattractiveness of moral relativism, as discussed at length above in Section III.

96. *See* P. BERGER, THE CAPITALIST REVOLUTION 32-33 (1986) (contrasting economically developed societies with traditional and underdeveloped societies in a qualitative, experiential way).

97. *See* Wellman, *supra* note 94, at 212.

98. Devine, *supra* note 6, at 417.

99. Swinburne, *The Objectivity of Morality*, 51 PHIL. 5, 11 (1976). Note also that even if the doctrines are utterly false, the twentieth century popularity

To agree that despite what one's own group says, one ought to give up one's slaves, is to commit oneself, potentially, to a painful long-term sacrifice. We should expect various forms of long-term resistance to the major premise, just as we should expect more resistance to an improved scientific theory from a scientist who has built her career on a contrary view than from an equally expert scientist with no practical or emotional stake in the matter. Of course, even if it is possible to convert an individual slaveholder, for example, there remains a broader class of slaveholders with strong common interests that persist, via continually changing membership, over long periods of time.

The objectivist account of moral variety and persisting moral dispute thus relies chiefly on obvious, undeniable features of human inclination and human society. Nor is this objectivist account simply a contrived, *ad hoc* response to the rise of modern moral relativism. Standard, traditional objectivist morality has long appreciated the phenomenon of continuing diversity of moral outlook.[100] Given the difficulty of showing the inadequacy of such accounts, we are left once more, as an unavoidable conclusion, with the unattractiveness of moral relativism.

IV. CONCLUSION

The appeal of relativism, whether in the college dormitory or in judicial chambers, is not difficult to understand. It seems, at

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of relativism, subjectivism, and noncognitivism may in some small measure itself help to account for the persistence, in new guises, of some old moral arguments, in that they provide new sources of resistance to asserted moral imperatives.

100. For example, Thomas Aquinas recognized that "all men are not agreed as to their ultimate end" and that tastes vary considerably. T. AQUINAS, TREATISE ON HAPPINESS qu. 1, art. 7. Aquinas observes that sometimes "a universal principle known by understanding or through some science, is perverted in a particular case by some passion." T. AQUINAS, TREATISE ON THE VIRTUES qu. 58, art. 5. Aquinas specifies that the natural law can and does change over time in several respects. ST. THOMAS AQUINAS ON LAW AND JUSTICE qu. 94, art. 5. He concludes that "[t]he general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people." *Id.* at qu. 95, art. 2, reply to objection 3. *See also id.* at art. 3. All citations are to the SUMMA THEOLOGICA, the First Part of the Second Part thereof.

least psychologically if not logically, to be a natural default position in an era of stridence and confusion. Relativism may seem to allow us to avoid the discomfort of moral and legal controversy. This is of course an illusion. While the relativist may disable herself from making at least certain kinds of moral and jurisprudential criticisms of questionable, if not horrifying, conduct and beliefs, the relativist must recognize that it is always logically open for her to be subjected to all sorts of depredations at the hands of other perfectly consistent relativists.

Nor is relativism, in either its moral or legal versions, a position that can somehow logically excuse itself from the task of seeking to establish its own merits. The relativist, insofar as she believes that relativism is uniquely true, presumably is committed to showing that competing doctrines such as objectivism and noncognitivism are false or unacceptable. This requires affirmative, reasoned argument. This task, it seems fair to say, has not yet been successfully discharged by the leading academic moral relativists. Nor can the task be avoided by arbitrarily clinging, in an *ad hoc* way, to a belief that a few of one's favorite moral beliefs are objectively, and not merely relatively, true. Any such unprincipled compromise must prove unstable over the long term.

It is admittedly unfair to ask the courts to justify at a genuinely philosophical level such legal relativism as their decisions display. It is not unfair, however, to ask the federal courts in particular to, for example, reconsider the extent to which the federal Constitution itself builds in or requires relativism or subjectivism, in light of the variety of pragmatic disadvantages of relativism discussed in this essay.

It is certainly possible in the abstract to welcome the enhanced influence of moral relativism in the law, despite what has been suggested above. There may be certain areas of the law where moral relativism may seem attractive to many. The problem, though, becomes one of trying to cabin the influence of moral relativism in a principled way. Why, for example, should the relativist not go on consistently to conclude that the morality of such matters as the distribution of marital assets upon divorce is inescapably relative to relevant reference groups involved, such as divorcing husbands and divorcing wives? To object on moral grounds to an apparently unfair property distribution[101]

101. *See, e.g.*, *In re* Marriage of Sirucek, 712 P.2d 769 (Mont. 1985) (wife,

would, under relativism, be merely to announce passionately and autobiographically which contending side one happened to identify with. The option of denouncing the property distribution as genuinely unfair in some familiar, serious sense of the term would, under relativism, have been forfeited. Obviously, the availability of the language of objective moral wrong by itself hardly guarantees the redress of such wrongs. But it is far from obvious that the loss of such language is a price we should be willing to pay.

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age 52, awarded less than 20% of net marital assets upon dissolution of 12 year marriage, essentially in the form of her own teacher's retirement pension benefits, where she contributed substantially, financially and otherwise, to the support of the money-losing ranch awarded to husband, age 63 and in good health at time of divorce).